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Author: Jason S. Beaton				
Performing Organization Name and Address: Virginia Transportation Research Council 530 Edgemont Road Charlottesville, VA 22903				
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<p>Abstract</p> <p>This report addresses how the Code of Virginia can be changed to improve Virginia's rate of testing for blood alcohol concentration (BAC) among drivers involved in crashes where there is a fatality. Currently, the implied consent statute in the Code mandates that a BAC test be conducted only after an arrest has been made. A review of U.S. Supreme Court cases and state law demonstrates that there are three options for modifying the implied consent statute.</p> <p>The first option is to require BAC testing of all drivers involved in a crash where there is a fatality but allow the results to be admissible in court as evidence against the driver only if probable cause exists independent of the test results. However, because a challenge to such a statute would present a constitutional search and seizure issue of first impression in Virginia's courts, the outcome of such a challenge cannot be predicted with any degree of certainty.</p> <p>The second option is to require BAC testing of all drivers involved in a crash where there is a fatality <i>and</i> some level of suspicion that does not amount to probable cause that the driver was committing the offense of driving under the influence of alcohol. However, although such a law is more likely to be upheld, there is still some risk that it would be found unconstitutional.</p> <p>If the Virginia legislature is risk-averse and is unwilling to make a change that might be declared unconstitutional by the courts, the third option is to amend the Code to require BAC testing where there is probable cause to believe that the driver is under the influence and a person has been seriously or fatally injured. Although this approach would be constitutionally safer, it would not be as effective as the first and second options for increasing the rate of BAC testing.</p>				

FINAL REPORT

**THE POTENTIAL IMPACT AND LEGAL FEASIBILITY OF REQUIRING ALCOHOL
TESTING OF ALL DRIVERS IN FATAL CRASHES IN VIRGINIA**

Jason Beaton
Graduate Legal Assistant

Virginia Transportation Research Council
(A Cooperative Organization Sponsored Jointly by the
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ABSTRACT

This report addresses how the Code of Virginia can be changed to improve Virginia's rate of testing for blood alcohol concentration (BAC) among drivers involved in crashes where there is a fatality. Currently, the implied consent statute in the Code mandates that a BAC test be conducted only after an arrest has been made. A review of U.S. Supreme Court cases and state law demonstrates that there are three options for modifying the implied consent statute.

The first option is to require BAC testing of all drivers involved in a crash where there is a fatality but allow the results to be admissible in court as evidence against the driver only if probable cause exists independent of the test results. However, because a challenge to such a statute would present a constitutional search and seizure issue of first impression in Virginia's courts, the outcome of such a challenge cannot be predicted with any degree of certainty.

The second option is to require BAC testing of all drivers involved in a crash where there is a fatality *and* some level of suspicion that does not amount to probable cause that the driver was committing the offense of driving under the influence of alcohol. However, although such a law is more likely to be upheld, there is still some risk that it would be found unconstitutional.

If the Virginia legislature is risk-averse and is unwilling to make a change that might be declared unconstitutional by the courts, the third option is to amend the Code to require BAC testing where there is probable cause to believe that the driver is under the influence and a person has been seriously or fatally injured. Although this approach would be constitutionally safer, it would not be as effective as the first and second options for increasing the rate of BAC testing.

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INTRODUCTION

Historically, Virginia has attempted to collect blood alcohol concentration (BAC) data on all fatally injured drivers but not on all surviving drivers. It would be beneficial for Virginia to increase BAC testing among surviving drivers for three reasons. First, increasing the BAC testing rate would give the Commonwealth a better understanding of the extent to which alcohol is involved in fatal motor vehicle crashes. With more information on the extent of the problem, the Commonwealth would be in a better position to respond to the problem itself. Second, increasing the BAC testing rate in Virginia could increase deterrence. If drivers understood that they would likely be tested for BAC if they were involved in a fatal crash, they might be less likely to engage in driving under the influence (DUI). Third, increasing the BAC testing rate would allow Virginia to meet the standards of Mothers Against Drunk Driving (MADD) and the National Highway Transportation Safety Administration (NHTSA).

This paper examines a legal solution designed to increase BAC testing rates in fatal crashes: amending the Code of Virginia (the Code) to require BAC testing in fatal crashes. This examination includes an analysis of the potential legal issues the Commonwealth might face if the Code were amended and a survey of laws in states that have some form of mandatory BAC testing in fatal crashes.

PURPOSE AND SCOPE

The purpose and scope of this report are to (1) identify legal barriers to BAC testing in Virginia and (2) identify the legal feasibility of removing these barriers.

METHODOLOGY

To achieve the study objectives, standard legal research methods were used. First, a review of reports and journal articles demonstrated how the problem of low BAC testing rates is affected by state law and highlighted various legal and policy issues that arise when the state law barriers are changed or removed. Second, research of case law facilitated identification of the legal framework under which courts would analyze the legal issues created by changing state law. Third, to support that framework and to analyze the legal issues associated with removing

state legal barriers, it was necessary to review laws and cases of states that have attempted to remove the same state legal barriers that are present in Virginia.

RESULTS

Barriers to BAC Testing Under Current Law in Virginia

According to MADD,¹ Virginia's rate of testing the BAC of drivers who survive a crash that resulted in a fatality is among the lowest in the nation.² The Code has several provisions that are relevant to BAC testing. First, the Code allows either a law enforcement officer or a person suspected of violating the DUI laws to request a breath analysis of BAC prior to arrest (for the complete text of all statutes cited in this report, see the Appendix).³ However, the results of the preliminary breath analysis are not admissible as evidence, the test can be refused by the driver in question, and a refusal to consent to the test is not admissible as evidence.⁴ Thus, the Code does not require BAC testing prior to arrest or offer any incentive for drivers to consent to the test prior to arrest.

The other relevant statute is Virginia's implied consent statute.⁵ This section of the Code states that "any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway . . . in this Commonwealth shall be deemed thereby, as a condition of such operation to have consented to determine the alcohol . . . content of his blood, *if* he is arrested for violation of [DUI] . . . within three hours of the alleged offense (emphasis added)."⁶ Subsection B further states that after an arrest for violation of certain provisions of the DUI statute, a person "shall submit to a breath test" or if a breath test is not available, "a blood test shall be given."⁷ Refusal to consent to a test under these circumstances is admissible as evidence against the driver, and refusal itself is grounds for sanctions under the Code.⁸ Although this does provide a driver with an incentive to submit to a BAC test, it does so only after an arrest has been made. As a result, the only drivers required to submit to a BAC test are those that an officer reasonably believes are under the influence of alcohol or drugs. The consequence of this is that Virginia is failing to test many drivers who are involved in fatal motor vehicle crashes.

In addition, the arrest requirement and the nature of crash scenes could combine to prevent detection of DUI offenders. A NHTSA study describes an officer's handling of a typical

¹Mothers Against Drunk Driving, *Full Virginia Report Card* (2002), available at http://www.madd.org/docs/rts2002/rts_VA_report.pdf.

²For an analysis of the impact of the various laws on state BAC testing rates, see National Highway Transportation Safety Administration. *State Laws and Practices for BAC Testing and Reporting Drivers Involved in Fatal Crashes*, Washington, DC, 2003. Accessed October 14, 2005, at http://www.nhtsa.dot.gov/people/injury/alcohol/BAC-Testing/images/State%20Laws_low.pdf

³Va. Code Ann. § 18.2-267 (2004).

⁴*Id.*

⁵Va. Code Ann. § 18.2-268.2 (2004).

⁶Va. Code Ann. § 18.2-268.2 (2004).

⁷*Id.* at subsection B.

⁸Va. Code Ann. § 18.2-268.3 (2005).

crash scene.⁹ The study indicates that the first priority is to secure the safety of the scene and that the next priority is to treat victims. Once the scene is secure and victims are being treated, the officer can begin to investigate. This is a reasonable set of priorities, but injured drivers may be taken to a hospital for treatment prior to the officer finishing the investigation or making an arrest. Since the Code requires BAC testing only if the person is arrested within three hours of the offense, and since it can be difficult for the officer to make an arrest in this timeframe if the driver is immediately taken to the hospital for further treatment, a number of drivers are never tested. Further, a report published by the Texas Transportation Institute indicates that a statute which requires an arrest before BAC testing prevents the BAC testing of drivers who die prior to being arrested.¹⁰ Thus, the only means by which a BAC test can be performed on a deceased driver in Virginia is through an investigation of death. Finally, even if an injured driver is arrested while in the care of a physician or hospital, practical obstacles can occur when an officer requests a blood sample from the suspect's physician.¹¹ Although § 18.2-268.2 of the Code allows officers to require a BAC test when the suspect is arrested within three hours of the alleged offense, the Code does not place any obligation on the physician to cooperate in providing a blood sample for a blood test without a court order. Instead, the Code merely details the qualifications of persons authorized to take a blood sample.¹²

Alternatives to the Current State of the Code of Virginia

The aforementioned NHTSA study arranges states into five categories based on the type of BAC testing law they have:

1. *True mandatory test*: 5 states
2. *Probable cause to believe that a DUI and fatality occurred*: 30 states and the District of Columbia
3. *Reduced standard (below probable cause)*: 5 states
4. *Statistical purposes only*: 1 state.
5. *No law*: 9 states, including Virginia.¹³

Since the study is more than two years old, there have been changes in several states because of legislative and judicial activity.

⁹National Highway Transportation Safety Administration. *State Laws and Practices for BAC Testing and Reporting Drivers Involved in Fatal Crashes*, Washington, DC, 2003. Accessed October 14, 2005, at http://www.nhtsa.dot.gov/people/injury/alcohol/BAC-Testing/images/State%20Laws_low.pdf.

¹⁰Texas Transportation Institute. *Improving Blood Alcohol Concentration (BAC) Testing and Reporting in Texas: A Summary of Workshop Results and Additional Investigations Regarding the Reasons for Texas' Low Level of Toxicological Testing of Drivers Involved in Fatal Crashes*. Center for Transportation Safety, College Station, TX, January 2003. Accessed October 14, 2005, at http://tti.tamu.edu/cts/reports/bac_workshop_results_summary.pdf.

¹¹Va. Code Ann. § 18.2-268.3 (2005).

¹²Va. Code Ann. § 18.2-268.5 (2004).

¹³National Highway Transportation Safety Administration. *State Laws and Practices for BAC Testing and Reporting Drivers Involved in Fatal Crashes*, Washington, DC, 2003. Accessed at http://www.nhtsa.dot.gov/people/injury/alcohol/BAC-Testing/images/State%20Laws_low.pdf.

In contrast to the NHTSA study, MADD claims that 39 states have mandatory BAC testing laws for fatal motor vehicle crashes.¹⁴ However, an examination of the NHTSA study and a MADD issue brief reveals overlap between states in the “probable cause” category in the NHTSA study and states that are in the “mandatory BAC” category in the MADD issue brief. All states that have a provision in their statutes requiring BAC testing in at least some circumstances where there is a fatality in a motor vehicle crash are defined as “mandatory BAC” states by MADD.¹⁵ In other words, the key ingredient for MADD is statutory language that includes words such as “fatal injury” or “substantial injury,” regardless of whether or not a probable cause requirement is present.

The absence of a specific provision in the Code that addresses fatal motor vehicle crashes has resulted in Virginia being placed in the “no law” category under NHTSA’s typology, and it has resulted in Virginia being one of 11 states that do not have a mandatory BAC testing provision as defined by MADD. This raises the possibility of amending the Code in several different ways. First, the Code could be amended to require BAC testing of all drivers where there is a motor vehicle crash that resulted in a fatality *and* there is probable cause to believe that the driver has committed DUI. Although such a change would satisfy MADD’s standard, it would not likely substantially increase BAC testing because the Code’s current BAC law tends to capture this situation because an arrest is made upon an officer having probable cause and an arrest for DUI creates a BAC test requirement under the Code. On the other hand, this change would not require formal arrest. Thus, it might increase the BAC testing rate to some degree. Second, the Code could be amended to require BAC testing of drivers involved in fatal motor vehicle crashes under certain circumstances that do not amount to probable cause that DUI has been committed.¹⁶ Such circumstances could include fault for the crash or some individualized suspicion regarding DUI that does not amount to probable cause. Third, the Code could be amended to require BAC testing of all drivers involved in fatal motor vehicle crashes, regardless of the circumstances and whether or not there was probable cause. This change would have the greatest impact on Virginia’s BAC testing rate.

These assertions regarding the impact of various laws on the rate of BAC testing are supported by the data and analysis in the NHTSA study.¹⁷ For example, in 2002, the median testing rate for surviving drivers was 79% in states with a true mandatory law, 22% in states with a reduced standard law, 32% in states with a probable cause law, 22% in states with a law that requires BAC testing for statistical purposes, and 33% in states with no law. Maine, which has a true mandatory law, had the highest testing rate at 90%, while Virginia, which has no law, had one of the lowest testing rates at 12% or less.¹⁸ Thus, there is a correlation between the testing rate and the type of law that the state has enacted. However, as the report indicates, enacting a

¹⁴Mothers Against Drunk Driving, *Mandatory BAC Testing—Issue Brief*, Irving, TX 2005. Accessed June 3, 2005, at <http://www.madd.org/activism/0,1056,7599,00.html>.

¹⁵*Id.*

¹⁶This would be analogous to the NHTSA’s “reduced standard law” category.

¹⁷National Highway Transportation Safety Administration. *State Laws and Practices for BAC Testing and Reporting Drivers Involved in Fatal Crashes*, Washington, DC, 2003. Accessed at http://www.nhtsa.dot.gov/people/injury/alcohol/BAC-Testing/images/State%20Laws_low.pdf.

¹⁸These data are available on the National Highway Transportation Safety Administration’s Fatality Analysis Reporting System and can be accessed at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2002/2002statealc.pdf>.

true mandatory law may not raise Virginia’s testing rate to the level of Maine’s testing rate because other factors affect the rate of BAC testing, such as the data collection and reporting process.

Legal Issue Created by Changing the Code to Increase BAC Testing Rate for Fatally Injured Drivers

Changing state law to increase BAC testing is likely to be a controversial topic and could result in a legal challenge. Proponents of a true mandatory BAC provision for surviving drivers are likely to argue that more testing is good public policy because it would serve two purposes: It would serve evidentiary purposes in that the test results could be used to assist in holding impaired drivers accountable in the legal system. It would also serve epidemiological purposes in that the results could be used by legislators to gauge the effects of policies and programs and by medical treatment personnel to encourage treatment for alcohol problems. On the other hand, opponents argue that such a broad requirement could violate the constitutional guarantee against unreasonable search and seizure.¹⁹ Indeed, an analysis of this issue demonstrates that the purpose and wording of the law are vital to whether it will be deemed unconstitutional by the courts.

The Virginia Constitution provides that “general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.”²⁰ Although the unreasonable search and seizure clause of the U.S. Constitution is slightly different from the language used in the Virginia Constitution, the Supreme Court of Virginia has determined that the search and seizure requirements under the Virginia Constitution are substantially the same as those of the Fourth Amendment of the U.S. Constitution.²¹ Thus, in Virginia courts, legal analysis of search and seizure issues is controlled by the requirements of the Fourth Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court.

The Analytical Framework for Search and Seizure Issues

In order to determine whether the search and seizure clause of the U.S. Constitution is even applicable to BAC testing, the Supreme Court of the United States would ask two questions. First, does the activity in question constitute a search and seizure? In the context of BAC testing, the Court has answered this question in the affirmative by finding that extracting a blood sample for a BAC test is a search and seizure²² and that conducting a breath analysis test is also a search and seizure.²³ The second question is whether the act of testing is an act by the

¹⁹U.S. Const. Amend. IV states, in relevant part, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause”

²⁰Va. Const. Art. I, § 10.

²¹*Zimmerman v. Town of Bedford*, 134 Va. 787, 801-802 (1922).

²²*Schmerber v. California*, 384 U.S. 757, 767 (1966).

²³*See Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 616-617 (1989).

government or its agent, so as to implicate the Fourth Amendment.²⁴ In response to this second question, the Court has determined that a law requiring a BAC test implicates the Fourth Amendment *even if* the test is administered by a private party because the law itself compels the action of the private party.²⁵ In other words, in such a situation, the private party is merely an agent of the government.

Although these two issues have been addressed by the Court, the specific issue of whether mandatory BAC testing law for surviving drivers in fatal crashes would create unreasonable search and seizures would be an issue of first impression for the Court. However, despite the fact that it has never expressly addressed this issue, the Court has established a framework for analysis by virtue of its consideration of BAC testing requirements in other contexts. This framework is best illustrated in two leading cases that involve BAC testing.

BAC Testing Exempt from the Warrant Requirement

In *Schmerber v. California*, decided in 1966, the Court considered a situation where a law enforcement officer arrested the defendant for DUI and ordered a physician to conduct a BAC test using a blood sample without first obtaining a warrant.²⁶ The government claimed that this was simply a search incident to a lawful arrest and that this fact alone should end the inquiry.²⁷ However, the Court rejected this argument, saying:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any [intrusions beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.²⁸

Thus, the question was whether or not the officer should have obtained a warrant prior to the BAC test being conducted. The Court reasoned that although the warrant requirement is the default for any search, the amount of time it would take to obtain a warrant in this case might have destroyed the evidence since BAC drops with time.²⁹ As a result, the Court concluded that the officer's actions were appropriate given the "special facts" of this case.³⁰ However, this conclusion was reached only after the Court acknowledged that the officer had probable cause.³¹ Thus, the *Schmerber* Court does not make it clear if the outcome would have been different had the officer had a level of individualized suspicion that was lower than probable cause.

Relying on *Schmerber* alone, the U.S. Court of Appeals for the Ninth Circuit, in *United States v. Chapel*, required probable cause before a blood sample may be taken without consent.³² Although the Ninth Circuit's decision is not binding in Virginia because Virginia is not within

²⁴*Id.* at 615.

²⁵*Id.* at 615-616.

²⁶*Schmerber*, 384 U.S. at 757.

²⁷*Id.* at 769.

²⁸*Id.* at 769-770.

²⁹*Id.* at 770-771.

³⁰*Id.* at 771.

³¹*Id.* at 770.

³²55 F.3d 1416, 1419 (9th Cir. 1995).

the jurisdiction of the Ninth Circuit, the decision does show that there may be a tendency by federal appellate courts to read a probable cause requirement into *Schmerber*.

The Special Needs Exception and the Balancing Test

One of the most vivid illustrations of how the U.S. Supreme Court analyzes search and seizure cases is *Skinner v. Railway Labor Executives Ass'n*.³³ *Skinner* may be the leading modern Supreme Court case on chemical testing for drugs and alcohol. It involved a challenge to a Federal Railroad Administration (FRA) regulation that required specific railroad employees be given blood and urine tests following particular major train accidents as part of the FRA's investigation of the cause of the accident.³⁴ The regulations established a penalty for refusal to submit to the tests, but they were not designed to assist in the prosecution of the individuals who were tested.³⁵ Ultimately, the Court decided that the regulations were constitutional. More important, however, is the reasoning behind that conclusion. At the outset, the Court lays the foundation for a "special needs" exception to the Warrant requirement and describes its method of analysis as follows:

In most criminal cases, we strike the balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. Except in well-defined circumstances, a search or seizure is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. We have recognized exceptions to this rule, however, "when special needs beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context.³⁶

Essentially, this is a restatement of *Schmerber* with the difference being that the Court is more explicit about its use of a balancing test in determining the existence of an exception to the warrant requirement. From this passage, one could still question whether and under what circumstances the probable cause requirement applies absent a warrant. However, the Court later addresses this issue:

Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law. When the balance of interests precludes insistence on a showing of probable cause, we have usually required "some quantum of individualized suspicion" before concluding that a search is reasonable. We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In *limited circumstances*, where privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion (emphasis added).³⁷

³³*Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

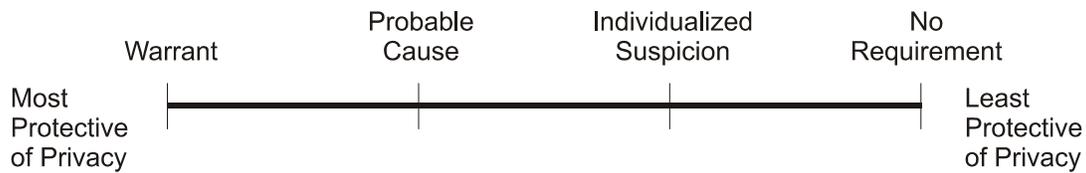
³⁴*Id.* at 602.

³⁵*Id.* at 611, 620.

³⁶*Id.* at 619.

³⁷*Id.* at 624.

One helpful way to think about this is to place the various requirements on a linear spectrum from most to least protective of an individual's privacy interests, as shown here:



The Warrant requirement provides the most protection to the individual. A probable cause requirement provides less protection than does the Warrant requirement because the law enforcement officer does not have to seek the consent of the courts for the search. An individualized suspicion requirement provides even less than does the probable cause requirement because the law enforcement officer must merely be suspicious of the individual. Finally, there are some circumstances when there is no requirement at all and, hence, no privacy protection whatsoever. The appropriate level of protection will be determined by a balancing test that weighs the individual's privacy interest against the government's interests.

This test forces the Court to make decisions at a low level of generality because there is no overarching rule that is applicable to a variety of cases. Instead, the Court must make its determination on a case-by-case basis, weighing the privacy and government interests under each particular set of facts. Further, the factual context in *Skinner* demonstrates that the test is to be used in all cases involving search and seizure, whether the search is for a prosecutorial purpose, a statistical purpose, or some other purpose. It involved a regulation that required "toxicological tests, not to assist in the prosecution of employees, but rather to 'prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'"³⁸ Although the FRA was not engaged in prosecution, the Court still engaged in a full search and seizure analysis before concluding that no individualized suspicion was required. Thus, to determine the constitutionality of mandatory BAC testing, it is necessary to duplicate the balancing test of *Skinner*, as a number of states have done. Since a determination of the applicability of a special needs exception depends on a balancing of "government interests" against "privacy interests," defining the respective interests is critical.

Government Interest

The government's interest is tied to the purpose behind the law, regulation, or government action. As mentioned previously, the *Skinner* Court found that the government's need to monitor alcohol levels of railroad employees is related to its function of ensuring public safety, rather than to prosecution. The Court acknowledged that public safety is enhanced because the regulations significantly amplify the deterrent effect of the sanction of the customary dismissal from employment associated with being impaired.³⁹ The Court also noted that knowledge of the cause of an accident is useful information in being able to respond to and

³⁸*Id.* at 620-621.

³⁹*Id.* at 629-630.

prevent such catastrophes.⁴⁰ Finally, the Court found that since “employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences” and time is of the essence with respect to BAC testing, the government’s interest in testing without a showing of individualized suspicion is “compelling.”⁴¹

This conclusion raises the question of whether the government has an interest in mandatory BAC testing in fatal motor vehicle crashes that is as compelling as its interest in preventing train catastrophes. The arguments cut both ways. On the one hand, driving is “fraught with risks of injury to others,” just as the operation of railroads; in fact, in terms of aggregate loss of life, motor vehicles may be even *more* dangerous than railroads. On the other hand, it is difficult to compare a single fatal automobile crash to a train catastrophe in terms of scale of injury and loss.

Although the answer to this question is uncertain, the Court makes it clear that the government’s interest is *less* compelling when the purpose of the restriction is related to law enforcement. Recall that the Court explicitly stated that the special needs exception applies only “when special needs beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”⁴² This statement is dispositive because it implies that the privacy interest will never be outweighed by the government’s interest when the government purpose is solely evidentiary. In other words, if the BAC test results are to be used as evidence, then probable cause *must* exist before the test is administered.

Privacy Interest

Government interest is only half of the test. The other half is the individual’s privacy interest. As was true of government interest, there is room for disagreement as to whether the intrusion on automobile drivers is analogous to the intrusion on railroad employees in *Skinner*. It is important to note that the holding of *Skinner* is limited to the context of railroad employees. Hence, it might be argued that railroad employees are distinguishable from automobile drivers in that there is more of an expectation of privacy when a person is in a private automobile than there is when a person is an employee of a common carrier such as a railroad company. Such an argument draws on the Court’s reasoning that a railroad employee does not have significant privacy interests because he or she “consents to significant restrictions in his freedom of movement where necessary for his employment” and may not be “free to come and go” as he or she pleases during working hours.⁴³ However, such restrictions do not exist for most automobile drivers. Nonetheless, some might contend that drivers and railroad employees *are* analogous because they both involve transportation in a public environment. According to this argument, *both* railroad employees and automobile drivers have lower expectations of privacy when they leave their homes and venture onto the public highways and railways. In other words, the expectations are the same, regardless of whether one is on a railroad or a public highway. Further, the Court itself has said that since blood tests are commonplace, the intrusion

⁴⁰*Id.* at 630.

⁴¹*Id.* at 628.

⁴²*Id.* at 619.

⁴³*Id.* at 624-625.

occasioned by a blood test is minimal.⁴⁴ Using this line of reasoning, one might argue that blood tests have a *de minimus* effect on the individual’s privacy interest.

These considerations have implications for drafting a law that requires mandatory BAC testing for drivers involved in fatal crashes. If the government’s interest in a mandatory BAC law categorically outweighs individual privacy interests, then no individualized suspicion or probable cause is required. Barring that extreme situation, however, the statute will need to make mandatory testing conditional upon either individualized suspicion or probable cause.

The View of the Virginia Supreme Court

Since a challenge to the amended Code may ultimately reach the Virginia Supreme Court, it is useful to examine the Virginia Supreme Court’s view of government interest vis-à-vis privacy interests. In *Lowe v. Commonwealth of Virginia*, a defendant challenged a sobriety checkpoint on the grounds that the roadblock constituted an unreasonable seizure in violation of his rights under the U.S. Constitution and Virginia Constitution.⁴⁵ In rejecting this argument, the court characterized the government’s interest in protecting the public from drunk drivers as “strong.”⁴⁶ Note that the purpose of the roadblock is *preventative* rather than *prosecutorial* and that once the driver is stopped there must be probable cause and an arrest before the implied consent provision takes effect. Moreover, the court found that the “minimal inconvenience” of the stop did not infringe upon the defendant’s “reasonable expectation of privacy.”⁴⁷ Although this case is certainly relevant, its relevance is limited by the court’s narrow analysis and by the fact that the officers were merely stopping someone temporarily on the roadway, rather than engaging in a physical intrusion of the person’s body as would be the case with a BAC test.⁴⁸

Analysis of Various State BAC Testing Laws in Light of the Supreme Court’s Framework

Because *Schmerber* and *Skinner* clearly establish the constitutionality of laws that require BAC testing when there is probable cause to believe that DUI has been committed, analyzing state statutes with such a requirement is unnecessary. Instead, this analysis focuses on state statutes with BAC test requirements that are *not* conditioned upon the existence of probable cause.

BAC Testing Laws That Have Not Been Overturned by Courts

Nebraska, Alaska, Maine, and Indiana all have what appear to be mandatory BAC testing laws for surviving drivers of fatal crashes, as defined by the NHTSA study, that have not been overturned by the courts. However, the legal details in each of these states vary, and close

⁴⁴*Id.* at 625.

⁴⁵337 S.E.2d 273 (1985).

⁴⁶*Id.* at 277.

⁴⁷*Id.*

⁴⁸*Id.*

examination of the statutes reveals that some of the states do not truly have a mandatory BAC testing law for drivers involved in fatal crashes.

Although Nebraska's mandatory BAC testing law has never had a direct challenge in court, close examination of the text of the statute reveals possible explanations for the lack of challenge. Section 60-6,103 of the Nebraska Statutes provides:

Any surviving driver or pedestrian sixteen years of age or older who is involved in a motor vehicle accident in which a person is killed shall be *requested*, if he or she has not otherwise been *directed* by a peace officer to submit to a chemical test under 60-6,197, to submit to a chemical test of blood, urine, or breath as the peace officer directs for the purpose of determining the amount of alcohol or drugs in his or her body fluid. The results of such test shall be reported in writing to the Director-State Engineer who shall tabulate such results on a monthly basis. Such information... shall be public information (emphasis added).⁴⁹

The first explanation for the lack of challenges is that the drafters use the term "requested" as opposed to the word "directed" or "required." Section 60-6,197.04 "requires" a preliminary breath test where the officer has reason to believe that the person has alcohol in his or her body.⁵⁰ Thus, the BAC test may not be truly mandatory under § 60-6,103. This conclusion is buttressed by the fact that, unlike § 60-6,197, § 60-6,103 does not include any penalty provisions for refusing to submit to a BAC test, and it would not be logical to require a test without creating any legal sanctions for refusal. In addition, there is no reason to believe that § 60-6,103 should be read in conjunction with any other section that provides for a penalty for refusal. The sections referenced at the end of § 60-6,103 pertain only to procedures for administering tests, and the very fact that the BAC test in § 61-6,103 is made conditional upon a BAC test not being required under § 60-6,197 implies that the two sections are mutually exclusive. Thus, if the tests are merely being *requested* instead of *required*, the decision to take the test rests with the driver, and he or she would be less likely to challenge the statute.

The second reason no challenges have occurred is that the text of the statute suggests that the statute's purpose is statistical and not evidentiary. A defendant would not need to challenge the statute because the test results under this section are not to be used as evidence. As a result, this statute does not appear to do anything more than create a policy that requires law enforcement officers to ask surviving drivers to submit to a BAC test when there has been a fatality.

Although Nebraska's statute lacks the necessary language to induce a court challenge, the mandatory BAC laws of Alaska, Indiana, and Maine have had challenges. The statutes and the outcomes were slightly different in each case. The Supreme Court of Alaska considered a statute that appeared to extend implied consent to any driver who "is involved in a motor vehicle accident that causes death or serious physical injury."⁵¹ However, in upholding the statute, the court declared that it will "narrowly construe statutes in order to avoid constitutional infirmity where that can be done without doing violence to the legislature's intent."⁵² The court was

⁴⁹Neb. Rev. Stat. § 60-6,103 (2004).

⁵⁰Neb. Rev. Stat. § 60-6,197.04 (2004).

⁵¹Alaska Stat. § 28.35.031(g) (Michie 2005).

⁵²*State v. Blank*, 90 P.3d 156, 162 (Alaska 2004).

concerned because it had read *Schmerber* to require the “exigent circumstances test” as described by the Ninth Circuit in *Chapel*,⁵³ which is that circuit’s version of the *Skinner* special needs exception balancing test. As a result, the court construed the text of the statute that says the “tests may be administered at the direction of a law enforcement officer” to mean the officer may administer the test when the exigent circumstances test is satisfied.⁵⁴ As the court states, part of the exigent circumstances test is probable cause.²⁹ Thus, while the court did not overturn the statute, it effectively read the mandatory aspect of mandatory BAC testing out of the statute.

The situation in Indiana is also unique. The Court of Appeals of Indiana has read *Skinner*’s special needs exception to the probable cause requirement of *Schmerber* to apply *only* to activities that are not related to law enforcement in the sense that they are designed to aid in the prosecution of individuals.⁵⁵ However, the court upheld the mandatory BAC statute, stating:

[it] merely requires a driver involved in a fatal accident or one involving serious bodily injury to submit to a test offered by a police officer pursuant to IC § 9-30-7-3 in order to comply with the implied consent law in Indiana and to avoid the mandatory sanctions set forth in IC § 9-30-7-5. . . . It does not require a driver to submit to a chemical test. . . . Although he would have been sanctioned for refusing the offered test of his blood, *Griswold* retained the option to refuse to submit to the chemical test. Because chapter seven does not require a search or seizure, it does not violate the right to be free from unreasonable searches and seizures and is therefore not unconstitutional.⁵⁶

Here, the Indiana court is reading the statute to entail no invasion, even if the defendant is punished for refusing to be subjected to the BAC test. Under this theory, no BAC testing law would ever be held unconstitutional because there is always the option to refuse. Such a conclusion is undermined by the fact that the employees in *Skinner* could have refused the test, yet because the regulations had a penalty provision for refusal, the Supreme Court still considered it an invasion and still engaged in a full scale balancing test to determine the outcome of the case. It should also be noted that this case was decided by an intermediate appellate court in Indiana rather than by the state’s highest court, which reduces its precedential value in that state.

Maine has a mandatory BAC testing statute that remains a true mandatory test, even after a court challenge in the state’s highest court.⁵⁷ However, Maine’s statute differs from the previous statute in that it uses a unique mechanism that prevented the court from overturning it.⁵⁸ The statute mandates BAC testing for all surviving drivers in a fatal crash, but the results can be used as evidence only in those situations where probable cause exists *independent* of the BAC test results.⁵⁹ In addition, the statute provides that failure to submit to the test results in suspension of the driver’s license for one year regardless of whether the test was conducted for statistical purposes.⁶⁰ This suspension is longer than the suspension resulting from two DUI

⁵³*See Id.* at 161.

⁵⁴*Id.* at 162.

⁵⁵*Hannoy v. State*, 789 N.E.2d 977, 985 (Ind. Ct. App. 2003).

⁵⁶*Griswold v. State*, 725 N.E.2d 416, 420 (Ind. Ct. App. 2001).

⁵⁷*See State v. Roche*, 681 A.2d 472 (Me. 1996).

⁵⁸*Id.* at 474.

⁵⁹Me. Rev. Stat. tit. 29, § 2522 (West 2004).

⁶⁰*Id.*

offenses but shorter than the suspension resulting from a third offense.⁶¹ The Supreme Judicial Court of Maine weaves *Skinner* into its analysis by analogizing to the circumstances that were present in *Skinner*: delay in testing would frustrate the government's purpose, highways are highly regulated, and intrusion occasioned by the tests is minor.⁶² On the other hand, the Maine court does not address the argument that the railroad employees in *Skinner* may have had a lower expectation of privacy than did drivers of automobiles. An alternative reading of *Skinner* holds that the circumstances of the BAC tests are critical to conclusions about one's expectation of privacy. If this is the correct reading, then the Court would not simply assume that the privacy expectations are the same because the intrusion is the same. Thus, while the Maine court's decision may provide comfort for advocates of true mandatory BAC testing laws for surviving drivers in fatal crashes, the analysis is not completely dispositive of the issue.

In crafting a mandatory BAC testing law, the statutory language used by Maine is preferred because it avoids the constitutional problems plaguing some of the mandatory BAC testing laws in other states that do not have such constitutional safeguards.

BAC Testing Laws That Have Been Overturned by Courts

The mandatory BAC testing laws of Georgia, Mississippi, Pennsylvania, and Illinois have been overturned by courts. Although the decisions in these four states purport to overturn the mandatory BAC testing laws on the grounds that they violate the U.S. Constitution, they also purport to do so because they violate the state constitutions. This fact alone will prevent the decisions from being appealed to the U.S. Supreme Court because of the doctrine of "independent and adequate state grounds."⁶³ Essentially, this doctrine works to bar appeals to the U.S. Supreme Court from the state court where the state court's decision is sufficiently grounded in state law, as opposed to federal law. However, there is one caveat: in order for the doctrine to apply, the state law upon which the decision rests cannot be repugnant to the U.S. Constitution or the laws of the United States. As a result, even if a federal court were to disagree with the state court's decision that the law violated the defendant's rights under the U.S. Constitution, it would not change the outcome of the case because the state court is the final arbiter of the state constitution; if the state court has overturned the state law, then there is nothing left for the federal court to analyze under the U.S. Constitution's Fourth Amendment. It will thus be difficult to get a definitive answer from the U.S. Supreme Court on this specific issue unless suit is filed in federal court as opposed to state court. However, despite the lack of guidance from the U.S. Supreme Court, the courts in these states sought to apply the *Skinner* analysis in their decisions.

The Supreme Court of Georgia handed down the most recent decision overturning a mandatory BAC testing law in *Cooper v. State*.⁶⁴ Prior to the Georgia Supreme Court's decision in that case, the Code of Georgia provided that:

⁶¹Me. Rev. Stat. tit. 29, § 2451 (West 2004).

⁶²*Roche*, 681 A.2d at 474.

⁶³*See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991).

⁶⁴*Cooper v. State*, 277 Ga. 282 (2003).

Any person who operates a motor vehicle upon the highways or elsewhere throughout the state shall be deemed to have given consent . . . to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug . . . *if such person is involved in any traffic accident resulting in serious injuries or fatalities* (emphasis added).⁶⁵

The case involved a two-vehicle crash in which the police officer took a blood sample from the driver after reading the implied consent statute and assuming that it applied because there was serious injury.⁶⁶ Like most states, Georgia presumes that its statutes are constitutional until it is established that the statute clearly infringes a constitutional provision or right.⁶⁷ Still, the court overturned the portion of the statute that is *italicized* for several reasons. First, the court read *Schmerber* to require probable cause before administering a BAC test to drivers.⁶⁸ Furthermore, the court held that the statute does not fit under the special needs exception of *Skinner* because in *Skinner* there was a special need that went *beyond* the normal need for law enforcement, whereas the purpose of the Georgia statute was to assist law enforcement officers with gathering evidence for criminal prosecution.⁶⁹

Although the Georgia statute is similar to the Indiana statute in that violation of the statute results in a driver's license suspension, the Georgia court did not reach the same conclusion as did the Indiana courts. Instead, the Supreme Court of Georgia reasoned that a state may not pass a law that says a person impliedly consents to a search where the search is otherwise unconstitutional due to a lack of probable cause.⁷⁰ Although § 40-5-67.1 of the Georgia Code also allows the refusal to be admitted into evidence against the driver at trial, it does not prevent the driver from refusing, just as the Indiana statute does not prevent the driver from refusing. In other words, the police officer cannot conduct a BAC test by force. The conflict between these two states underscores the risk associated with having a mandatory BAC law that does not have either a probable cause requirement or some language indicating that without probable cause the results of the test cannot be used as evidence. Indeed, even the Georgia court distinguishes the Maine case in a footnote because the Maine statute "contained a constitutional safeguard that allowed the test results to be admissible at trial only if the court was satisfied that probable cause existed, independent of the test results"⁷¹

The Supreme Courts of Mississippi and Pennsylvania both overturned similar statutory provisions using similar reasoning.⁷² In addition, the Mississippi Supreme Court used the same reasoning as the Georgia Supreme Court in distinguishing the Maine statute from its own statute.⁷³ Thus, it appears that all of these states have latched on to language in *Skinner* —i.e., they appear to create a special needs exception for those situations where there is a need beyond the normal need for law enforcement. In doing so, they are focusing more on whether the data are used for prosecution or preventative purposes instead of the severity of potential crashes. In

⁶⁵Ga. Code Ann. § 40-5-55 (a) (2002).

⁶⁶*Cooper*, 277 Ga. at 283-84.

⁶⁷*Id.* at 284.

⁶⁸*Id.* at 286-87.

⁶⁹*Id.* at 288-89.

⁷⁰*Id.* at 291.

⁷¹*Id.* at 288 n.7.

⁷²See *McDuff v. State*, 763 So. 2d 850 (Miss. 2000); *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992).

⁷³*McDuff*, 763 So. 2d at 855.

addition, by failing to criticize the Maine court, both Mississippi and Georgia are implying that administering BAC tests to automobile drivers does *not* amount to a greater intrusion of privacy interests than does administering BAC tests to railway employees. This does not mean that there is certainty about how the U.S. Supreme Court would decide these cases, but it does demonstrate that the courts in Georgia and Mississippi have not preempted their respective legislatures from enacting a statute similar to Maine’s mandatory BAC statute. Thus, in Georgia and Mississippi, the risk of having such a statute overturned is not as high as it otherwise would be.

Another option available to a legislature seeking to increase BAC testing in fatal crashes would be to adopt what NHTSA calls a “reduced-standard” BAC testing law. Essentially, these laws require BAC testing of surviving drivers in fatal crashes where the condition to the requirement to administer the test amounts to something less than probable cause. For example, at one time Illinois law provided that implied consent exists whenever a driver is merely at fault for a crash that resulted in a fatality.⁷⁴ However, the Supreme Court of Illinois overturned this statute.⁷⁵ The court first found that being at fault for a crash does *not* amount to probable cause or individualized suspicion for DUI.⁷⁶ It then noted that the special needs exception of *Skinner* does not apply because *Skinner* can be distinguished on the following grounds: First, the tests in *Skinner* were implemented “to prevent railroad accidents rather than to aid in the criminal prosecution of employees.”⁷⁷ Second, drivers of automobiles have a comparatively greater expectation of privacy than railroad employees because railroad employees participate in a highly regulated industry.⁷⁸ Thus, in balancing the privacy interest of the typical automobile driver with the government interest in prosecution, the court reached the conclusion that the *Skinner* special needs exception does not apply. As a result, the statute in question was unconstitutional because it allowed officers to require BAC testing absent any individualized suspicion.

OPTIONS FOR VIRGINIA

There are three options for amending the Code of Virginia to increase the rate of BAC testing in fatal motor vehicle crashes.

1. *The Code could be amended to require BAC testing of all drivers involved in a motor vehicle crash that results in a fatality and where there is probable cause to believe that the driver has committed DUI.* Although this solution would likely be held constitutional, it would not substantially increase BAC testing because the Code’s current BAC law tends to capture this situation. On the other hand, since formal arrest is required under the Code and the suggested change would *not* require formal arrest, such an amendment could increase the BAC testing rate to some degree.

⁷⁴625 Ill. Comp. Stat. 5/11-501.6 (2005).

⁷⁵*King v. Ryan*, 607 Ne.E.2d 154 (Ill. 1992).

⁷⁶*Id.* at 158.

⁷⁷*Id.* at 159.

⁷⁸*Id.* at 160.

2. *The Code could be amended to require BAC testing of drivers involved in fatal motor vehicle crashes under particular circumstances that do not amount to probable cause that DUI has been committed.*⁷⁹ Such circumstances could include the fault for the crash or some individualized suspicion regarding DUI that does not amount to probable cause. This option creates more risk of being overturned by the courts than does the first option because it provides less protection against unreasonable searches and seizures.
3. *The Code could be amended to require BAC testing of all drivers involved in fatal motor vehicle crashes regardless of the circumstances and whether or not there is probable cause.* This change would have the greatest impact on Virginia's BAC testing rate but would also create the most risk to the Commonwealth because it would provide the least amount of protection against unreasonable searches and seizures.

A number of states that have attempted to amend their statutes to require BAC testing of all drivers in fatal crashes have faced legal challenges on the grounds that the mandatory BAC provision results in an unreasonable search and seizure, a violation of the Fourth Amendment to the U.S. Constitution and many state constitutions. Although some states have been successful in defending a legal challenge, others have not. A review of the statutes and cases in various states suggests that the specific wording and requirements of the statute can affect the outcome of the legal challenge. Statutes that require BAC testing without drawing a distinction between using the results for statistical purposes and using them for evidentiary purposes tend to be overturned because of the lack of a probable cause requirement. In contrast to these types of statutes, Maine's mandatory BAC testing statute has been found more defensible. Although Maine does require BAC testing of all drivers involved in a fatal crash, its statute provides that the test results can be used only for statistical purposes unless there is probable cause *independent* of the test results. Maine itself has successfully defended its statute against a constitutional challenge, and dicta in the decisions of various other state courts indicate that Maine's statute is acceptable. As a result, Maine's statutory language could be viewed as a model for a successful mandatory BAC law if Virginia decides to move forward with a true mandatory BAC testing law.

Although using Maine's statute as a model for amending the Code of Virginia will not prevent a legal challenge, successful defense of the amended Code would be more likely than if the statute makes no distinction between using the test results for statistical purposes and using the results for evidentiary purposes. Still, courts in Virginia are not bound by rulings in other states, but they are bound by precedent set by the U.S. Supreme Court and the Supreme Court of Virginia. However, since this would be an issue of first impression in Virginia, it is impossible to predict the outcome with any degree of certainty. Thus, if the Virginia General Assembly is risk averse to the possibility of having a statute overturned on constitutional grounds, it should choose to forego this option and instead amend the Code consistent with the first and second options.

⁷⁹This would be analogous to NHTSA's "reduced standard law" category.

APPENDIX: RELEVANT STATUTES

Virginia

§ 18.2-267. Preliminary analysis of breath to determine alcoholic content of blood

A. Any person who is suspected of a violation of § 18.2-266, 18.2-266.1, subsection B of § 18.2-272, or a similar ordinance shall be entitled, if such equipment is available, to have his breath analyzed to determine the probable alcoholic content of his blood. The person shall also be entitled, upon request, to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. His breath may be analyzed by any police officer of the Commonwealth, or of any county, city or town, or by any member of a sheriff's department in the normal discharge of his duties.

B. The Department of Forensic Science shall determine the proper method and equipment to be used in analyzing breath samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same.

C. Any person who has been stopped by a police officer of the Commonwealth, or of any county, city or town, or by any member of a sheriff's department and is suspected by such officer to be guilty of an offense listed in subsection A, shall have the right to refuse to permit his breath to be so analyzed, and his failure to permit such analysis shall not be evidence in any prosecution for an offense listed in subsection A.

D. Whenever the breath sample analysis indicates that alcohol is present in the person's blood, the officer may charge the person with a violation of an offense listed in subsection A. The person so charged shall then be subject to the provisions of §§ 18.2-268.1 through 18.2-268.12, or of a similar ordinance.

E. The results of the breath analysis shall not be admitted into evidence in any prosecution for an offense listed in subsection A, the purpose of this section being to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having committed an offense listed in subsection A.

F. Police officers or members of any sheriff's department shall, upon stopping any person suspected of having committed an offense listed in subsection A, advise the person of his rights under the provisions of this section.

G. Nothing in this section shall be construed as limiting the provisions of §§ 18.2-268.1 through 18.2-268.12.

§ 18.2-268.2. Implied consent to post-arrest testing to determine drug or alcohol content of blood

A. Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in the Commonwealth shall be deemed thereby, as a

condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he is arrested for violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or of a similar ordinance within three hours of the alleged offense.

B. Any person so arrested for a violation of clause (i) or (ii) of § 18.2-266 or both, § 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance shall submit to a breath test. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to administration of the test, be advised by the person administering the test that he has the right to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. If the equipment automatically produces a written printout of the breath test result, the printout, or a copy, shall be given to the accused.

C. A person, after having been arrested for a violation of clause (iii), (iv), or (v) of § 18.2-266 or § 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance, may be required to submit to a blood test to determine the drug or both drug and alcohol content of his blood. When a person, after having been arrested for a violation of § 18.2-266 (i) or (ii) or both, submits to a breath test in accordance with subsection B or refuses to take or is incapable of taking such a breath test, he may be required to submit to tests to determine the drug or both drug and alcohol content of his blood if the law-enforcement officer has reasonable cause to believe the person was driving under the influence of any drug or combination of drugs, or the combined influence of alcohol and drugs.

§ 18.2-268.3. Refusal of tests; penalties; procedures

A. It shall be unlawful for a person who is arrested for a violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or of a similar ordinance to unreasonably refuse to have samples of his blood or breath or both blood and breath taken for chemical tests to determine the alcohol or drug content of his blood as required by § 18.2-268.2 and any person who so unreasonably refuses is guilty of a violation of this section.

B. When a person is arrested for a violation of § 18.2-51.4, 18.2-266, 18.2-266.1 or, subsection B of § 18.2-272 or of a similar ordinance and such person refuses to permit blood or breath or both blood and breath samples to be taken for testing as required by § 18.2-268.2, the arresting officer shall advise the person, from a form provided by the Office of the Executive Secretary of the Supreme Court, that (i) a person who operates a motor vehicle upon a highway in the Commonwealth is deemed thereby, as a condition of such operation, to have consented to have samples of his blood and breath taken for chemical tests to determine the alcohol or drug content of his blood, (ii) a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial, (iii) the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of the Commonwealth, (iv) the criminal penalty for unreasonable refusal within 10 years of a prior conviction for driving while intoxicated or unreasonable refusal is a Class 2 misdemeanor, and (v) the criminal penalty for unreasonable refusal within 10 years of any two prior convictions for driving while intoxicated or unreasonable refusal is a Class 1 misdemeanor. The form from which the arresting officer

shall advise the person arrested shall contain a brief statement of the law requiring the taking of blood or breath samples, a statement that a finding of unreasonable refusal to consent may be admitted as evidence at a criminal trial, and the penalties for refusal.

C. The arresting officer shall, under oath before the magistrate, execute the form and certify, (i) that the defendant has refused to permit blood or breath or both blood and breath samples to be taken for testing; (ii) that the officer has read the portion of the form described in subsection B to the arrested person; (iii) that the arrested person, after having had the portion of the form described in subsection B read to him, has refused to permit such sample or samples to be taken; and (iv) how many, if any, violations of this section, § 18.2-266, or any offense described in subsection E of § 18.2-270 the arrested person has been convicted of within the last 10 years. Such sworn certification shall constitute probable cause for the magistrate to issue a warrant or summons charging the person with unreasonable refusal. The magistrate shall attach the executed and sworn advisement form to the warrant or summons. The warrant or summons for a first offense under this section shall be executed in the same manner as a criminal warrant or summons. If the person arrested has been taken to a medical facility for treatment or evaluation of his medical condition, the arresting officer may read the advisement form to the person at the medical facility, and issue, on the premises of the medical facility, a summons for a violation of this section in lieu of securing a warrant or summons from the magistrate. The magistrate or arresting officer, as the case may be, shall forward the executed advisement form and warrant or summons to the appropriate court.

D A first violation of this section is a civil offense and subsequent violations are criminal offenses. For a first offense the court shall suspend the defendant's privilege to drive for a period of one year. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

If a person is found to have violated this section and within 10 years prior to the date of the refusal he was found guilty of any of the following: a violation of this section, a violation of § 18.2-266, or a violation of any offense listed in subsection E of § 18.2-270, arising out of separate occurrences or incidents, he is guilty of a Class 2 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of three years. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

If a person is found guilty of a violation of this section and within 10 years prior to the date of the refusal he was found guilty of any two of the following: a violation of this section, a violation of § 18.2-266, or a violation of any offense listed in subsection E of § 18.2-270 arising out of separate occurrences or incidents, he is guilty of a Class 1 misdemeanor and the court shall suspend the defendant's privilege to drive for a period of three years. This suspension period is in addition to the suspension period provided under § 46.2-391.2.

§ 18.2-268.5. Qualifications and liability of persons authorized to take blood sample; procedure for taking samples

For purposes of this article, only a physician, registered nurse, licensed practical nurse, phlebotomist, graduate laboratory technician or a technician or nurse designated by order of a

circuit court acting upon the recommendation of a licensed physician, using soap and water, polyvinylpyrrolidone iodine, pvp iodine, povidone iodine or benzalkonium chloride to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining its alcohol or drug or both alcohol and drug content. It is a Class 3 misdemeanor to reuse single-use-only needles or syringes. No civil liability shall attach to any person authorized to withdraw blood as a result of the act of withdrawing blood as provided in this section from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures. However, the person shall not be relieved from liability for negligence in the withdrawing of any blood sample.

No person arrested for a violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272, or a similar ordinance shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for in this section.

§ 18.2-268.8. Fees

Payment for withdrawing blood shall not exceed \$ 25, which shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for a violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or of a similar ordinance, or is placed under the purview of a probational, educational, or rehabilitational program as set forth in § 18.2-271.1, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or a similar ordinance, a fee of \$ 25 for testing the first blood sample by the Department shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the state treasury.

§ 32.1-283. Investigation of deaths; obtaining consent to removal of organs, etc.; fees

A. Upon the death of any person from trauma, injury, violence, poisoning, accident, suicide or homicide, or suddenly when in apparent good health, or when unattended by a physician, or in jail, prison, other correctional institution or in police custody, or who is a patient or resident of a state mental health or mental retardation facility, or suddenly as an apparent result of fire, or in any suspicious, unusual or unnatural manner, or the sudden death of any infant less than eighteen months of age whose death is suspected to be attributable to Sudden Infant Death Syndrome (SIDS), the medical examiner of the county or city in which death occurs shall be notified by the physician in attendance, hospital, law-enforcement officer, funeral director or any other person having knowledge of such death. Good faith efforts shall be made by such person or institution having custody of the dead body to identify the next of kin of the decedent, and such identity, if determined, shall be provided to the Chief Medical Examiner upon transfer of the dead body. After identification of the next of kin, the person or institution, or agent of such person or

institution, having custody of the dead body shall attempt to obtain consent for removal of the pituitary or other organs, glands, eyes or tissues for use in transplants or therapy.

B. Upon being notified of a death as provided in subsection A, the medical examiner shall take charge of the dead body, make an investigation into the cause and manner of death, reduce his findings to writing, and promptly make a full report to the Chief Medical Examiner. In order to facilitate his investigation, the medical examiner is authorized to inspect and copy the pertinent medical records of the decedent whose death he is investigating. Full directions as to the nature, character and extent of the investigation to be made in such cases shall be furnished each medical examiner by the Chief Medical Examiner, together with appropriate forms for the required reports and instructions for their use. The facilities and personnel under the Chief Medical Examiner shall be made available to medical examiners in such investigations.

C. A copy of each report pursuant to this section shall be delivered to the appropriate attorney for the Commonwealth and to the appropriate law-enforcement agency investigating the death. A copy of any such report regarding the death of a victim of a traffic accident shall be furnished upon request to the State Police and the Highway Safety Commission. In addition, a copy of any autopsy report concerning a patient or resident of a state mental health or mental retardation facility shall be delivered to the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and to the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services.

D. For each investigation under this article, including the making of the required reports, the medical examiner shall receive a fee established by the Board within the limitations of appropriations for the purpose. Such fee shall be paid by the Commonwealth, if the deceased is not a legal resident of the county or city in which his death occurred. In the event the deceased is a legal resident of the county or city in which his death occurred, such county or city shall be responsible for the fee; however, the Commonwealth shall reimburse such county or city to the extent such fee exceeds \$ 20. If the deceased is a patient or resident of a state mental health or mental retardation facility, the fee shall be paid by the Department of Mental Health, Mental Retardation and Substance Abuse Services.

E. Nothing herein shall be construed to interfere with the autopsy procedure or with the routine obtaining of consent for removal of organs as conducted by surgical teams or others.

§ 32.1-285. Autopsies

A. If, in the opinion of the medical examiner investigating the death or of the Chief Medical Examiner, it is advisable and in the public interest that an autopsy be made or if an autopsy is requested by the attorney for the Commonwealth or by a judge of the circuit court of the county or city wherein such body is or where death occurred or wherein any injury contributing to or causing death was sustained, an autopsy shall be performed by the Chief Medical Examiner, an assistant chief medical examiner or a pathologist employed as provided in § 32.1-281. Upon petition of a member of the immediate family or the spouse of the deceased in a case of death by injury, such circuit court may, for good cause shown, order an autopsy, after providing notice and an opportunity to be heard to the attorney for the Commonwealth for the jurisdiction wherein

the injury contributing to or causing death was sustained or where death occurred. Further, in all cases of death suspected to be attributable to Sudden Infant Death Syndrome (SIDS), an autopsy shall be advisable and in the public interest and shall be performed as required by § 32.1-285.1. A full record and report of the facts developed by the autopsy and findings of the person making such autopsy shall be promptly made and filed with the Chief Medical Examiner and a copy furnished the judge or attorney for the Commonwealth requesting such autopsy. In the discretion of the Chief Medical Examiner or the medical examiner, a copy of any autopsy report or findings may be furnished to any appropriate attorney for the Commonwealth and to the appropriate law-enforcement agency investigating the death.

B. In the case of a child death for which an autopsy is performed and the autopsy indicates child abuse or neglect contributed to the cause of the death, or the child suffered from abuse and neglect, the medical examiner conducting the autopsy shall report the case immediately to the child protective services unit of the local Department of Social Services.

Alaska

Sec. 28.35.031. Implied consent

(a) A person who operates or drives a motor vehicle in this state or who operates an aircraft as defined in AS 28.35.030(t) or who operates a watercraft as defined in AS 28.35.030(t) shall be considered to have given consent to a chemical test or tests of the person's breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle or operating an aircraft or a watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance or if lawfully arrested under AS 28.35.280 for the offense of minor operating a vehicle after consuming alcohol. The test or tests shall be administered at the direction of a law enforcement officer who has probable cause to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while under the influence of an alcoholic beverage, inhalant, or controlled substance or that the person was a minor operating a vehicle after consuming alcohol.

(b) A person who operates or drives a motor vehicle in this state or who operates an aircraft or watercraft shall be considered to have given consent to a preliminary breath test for the purpose of determining the alcoholic content of the person's blood or breath. A law enforcement officer may administer a preliminary breath test at the scene of the incident if the officer has probable cause to believe that a person's ability to operate a motor vehicle, aircraft, or watercraft is impaired by the ingestion of alcoholic beverages and that the person

(1) was operating or driving a motor vehicle, aircraft, or watercraft that is involved in an accident;

(2) committed a moving traffic violation or unlawfully operated an aircraft or watercraft; in this paragraph, "unlawfully" means in violation of any federal, state, or municipal statute, regulation, or ordinance, except for violations that do not provide reason to believe that the operator's ability

to operate the aircraft or watercraft was impaired by the ingestion of alcoholic beverages; or

(3) was operating or driving a motor vehicle in violation of AS 28.35.029(a).

(c) Before administering a preliminary breath test under (b) of this section, the officer shall advise the person that refusal may be used against the person in a civil or criminal action arising out of the incident and that refusal is an infraction. If the person refuses to submit to the test, the test shall not be administered.

(d) The result of the test under (b) of this section may be used by the law enforcement officer to determine whether the driver or operator should be arrested.

(e) Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction.

(f) If a driver or operator is arrested, the provisions of (a) of this section apply. The preliminary breath test authorized in this section is in addition to any tests authorized under (a) of this section.

(g) A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a chemical test or tests of the person's breath and blood for the purpose of determining the alcoholic content of the person's breath and blood and shall be considered to have given consent to a chemical test or tests of the person's blood and urine for the purpose of determining the presence of controlled substances in the person's blood and urine if the person is involved in a motor vehicle accident that causes death or serious physical injury to another person. The test or tests may be administered at the direction of a law enforcement officer who has probable cause to believe that the person was operating or driving a motor vehicle in this state that was involved in an accident causing death or serious physical injury to another person.

(h) Nothing in this section shall be construed to restrict searches or seizures under a warrant issued by a judicial officer, in addition to a test permitted under this section.

Georgia (2002)

§ 40-5-55. Implied consent to chemical tests

(a) The State of Georgia considers that any person who drives or is in actual physical control of any moving vehicle in violation of any provision of Code Section 40-6-391 constitutes a direct and immediate threat to the welfare and safety of the general public. Therefore, any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391 or if such person is involved in any traffic accident resulting in serious injuries or fatalities. The test or tests shall be administered at the

request of a law enforcement officer having reasonable grounds to believe that the person has been driving or was in actual physical control of a moving motor vehicle upon the highways or elsewhere throughout this state in violation of Code Section 40-6-391. The test or tests shall be administered as soon as possible to any person who operates a motor vehicle upon the highways or elsewhere throughout this state who is involved in any traffic accident resulting in serious injuries or fatalities. Subject to Code Section 40-6-392, the requesting law enforcement officer shall designate which of the test or tests shall be administered, provided a blood test with drug screen may be administered to any person operating a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Code section, and the test or tests may be administered, subject to Code Section 40-6-392.

(c) As used in this Code section, the term "traffic accident resulting in serious injuries or fatalities" means any motor vehicle accident in which a person was killed or in which one or more persons suffered a fractured bone, severe burns, disfigurement, dismemberment, partial or total loss of sight or hearing, or loss of consciousness.

Illinois

§ 625 ILCS 5/11-501.6. Driver involvement in personal injury or fatal motor vehicle accident—chemical test

Sec. 11-501.6. Driver involvement in personal injury or fatal motor vehicle accident—chemical test. (a) Any person who drives or is in actual control of a motor vehicle upon the public highways of this State and who has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test using a portable device as approved by the Department of State Police or to a chemical test or tests of blood, breath, or urine for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds of such person's blood if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code or a similar provision of a local ordinance, with the exception of equipment violations contained in Chapter 12 of this Code [625 ILCS 5/12-100], or similar provisions of local ordinances. The test or tests shall be administered at the direction of the arresting officer. The law enforcement agency employing the officer shall designate which of the aforesaid tests shall be administered. A urine test may be administered even after a blood or breath test or both has been administered. Compliance with this Section does not relieve such person from the requirements of Section 11-501.1 of this Code [625 ILCS 5/11-501.1].

(b) Any person who is dead, unconscious or who is otherwise in a condition rendering such person incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (a) of this Section. In addition, if a driver of a vehicle is receiving medical treatment as a result of a motor vehicle accident, any physician licensed to practice medicine, registered

nurse or a phlebotomist acting under the direction of a licensed physician shall withdraw blood for testing purposes to ascertain the presence of alcohol, other drug or drugs, or intoxicating compound or compounds, upon the specific request of a law enforcement officer. However, no such testing shall be performed until, in the opinion of the medical personnel on scene, the withdrawal can be made without interfering with or endangering the well-being of the patient.

(c) A person requested to submit to a test as provided above shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test, or submission to the test resulting in an alcohol concentration of 0.08 or more, or any amount of a drug, substance, or intoxicating compound resulting from the unlawful use or consumption of cannabis, as covered by the Cannabis Control Act [720 ILCS 550/1 et seq.], a controlled substance listed in the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], or an intoxicating compound listed in the Use of Intoxicating Compounds Act [720 ILCS 690/0.01 et seq.] as detected in such person's blood or urine, may result in the suspension of such person's privilege to operate a motor vehicle. The length of the suspension shall be the same as outlined in Section 6-208.1 of this Code [625 ILCS 5/6-208.1] regarding statutory summary suspensions.

(d) If the person refuses testing or submits to a test which discloses an alcohol concentration of 0.08 or more, or any amount of a drug, substance, or intoxicating compound in such person's blood or urine resulting from the unlawful use or consumption of cannabis listed in the Cannabis Control Act [720 ILCS 550/1 et seq.], a controlled substance listed in the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], or an intoxicating compound listed in the Use of Intoxicating Compounds Act [720 ILCS 690/0.01 et seq.], the law enforcement officer shall immediately submit a sworn report to the Secretary of State on a form prescribed by the Secretary, certifying that the test or tests were requested pursuant to subsection (a) and the person refused to submit to a test or tests or submitted to testing which disclosed an alcohol concentration of 0.08 or more, or any amount of a drug, substance, or intoxicating compound in such person's blood or urine, resulting from the unlawful use or consumption of cannabis listed in the Cannabis Control Act [720 ILCS 550/1 et seq.], a controlled substance listed in the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], or an intoxicating compound listed in the Use of Intoxicating Compounds Act [720 ILCS 690/0.01 et seq.].

Upon receipt of the sworn report of a law enforcement officer, the Secretary shall enter the suspension to the individual's driving record and the suspension shall be effective on the 46th day following the date notice of the suspension was given to the person.

The law enforcement officer submitting the sworn report shall serve immediate notice of this suspension on the person and such suspension shall be effective on the 46th day following the date notice was given.

In cases where the blood alcohol concentration of 0.08 or more, or any amount of a drug, substance, or intoxicating compound resulting from the unlawful use or consumption of cannabis as listed in the Cannabis Control Act [720 ILCS 550/1 et seq.], a controlled substance listed in the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], or an intoxicating compound listed in the Use of Intoxicating Compounds Act [720 ILCS 690/0.01 et seq.], is established by a subsequent analysis of blood or urine collected at the time of arrest, the arresting officer shall

give notice as provided in this Section or by deposit in the United States mail of such notice in an envelope with postage prepaid and addressed to such person at his address as shown on the Uniform Traffic Ticket and the suspension shall be effective on the 46th day following the date notice was given.

Upon receipt of the sworn report of a law enforcement officer, the Secretary shall also give notice of the suspension to the driver by mailing a notice of the effective date of the suspension to the individual. However, should the sworn report be defective by not containing sufficient information or be completed in error, the notice of the suspension shall not be mailed to the person or entered to the driving record, but rather the sworn report shall be returned to the issuing law enforcement agency.

(e) A driver may contest this suspension of his driving privileges by requesting an administrative hearing with the Secretary in accordance with Section 2-118 of this Code [625 ILCS 5/2-118]. At the conclusion of a hearing held under Section 2-118 of this Code [625 ILCS 5/2-118], the Secretary may rescind, continue, or modify the order of suspension. If the Secretary does not rescind the order, a restricted driving permit may be granted by the Secretary upon application being made and good cause shown. A restricted driving permit may be granted to relieve undue hardship to allow driving for employment, educational, and medical purposes as outlined in Section 6-206 of this Code [625 ILCS 5/6-206]. The provisions of Section 6-206 of this Code [625 ILCS 5/6-206] shall apply.

(f) (Blank)

(g) For the purposes of this Section, a personal injury shall include any type A injury as indicated on the traffic accident report completed by a law enforcement officer that requires immediate professional attention in either a doctor's office or a medical facility. A type A injury shall include severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene.

Maine

§ 2521. Implied consent to chemical tests

1. MANDATORY SUBMISSION TO TEST. If there is probable cause to believe a person has operated a motor vehicle while under the influence of intoxicants, that person shall submit to and complete a test to determine blood-alcohol level and drug concentration by analysis of blood, breath or urine.

2. TYPE OF TEST. A law enforcement officer shall administer a breath test unless, in that officer's determination, a breath test is unreasonable.

The law enforcement officer may determine which type of breath test is to be administered.

Another chemical test must be administered in place of a breath test.

For a blood test the operator may choose a physician, if reasonably available.

3. WARNINGS. Neither a refusal to submit to a test nor a failure to complete a test may be used for any of the purposes specified in paragraph A, B or C unless the person has first been told that the refusal or failure will:

A. Result in suspension of that person's driver's license for a period up to 6 years;

B. Be admissible in evidence at a trial for operating under the influence of intoxicants; and

C. Be considered an aggravating factor at sentencing if the person is convicted of operating under the influence of intoxicants that, in addition to other penalties, will subject the person to a mandatory minimum period of incarceration.

4. EXCLUSION AS EVIDENCE. A test result may not be excluded as evidence in a proceeding before an administrative officer or court solely as a result of the failure of the law enforcement officer to comply with the notice of subsection 3.

5. SUSPENSION FOR REFUSAL. The Secretary of State shall immediately suspend the license of a person who fails to submit to and complete a test.

6. PERIOD OF SUSPENSION. Except when a longer period of suspension is otherwise provided by law, the suspension is for a period of 275 days for the first refusal, 18 months for a 2nd refusal, 4 years for a 3rd refusal and 6 years for a 4th refusal.

7. DECISION. A suspension must be removed if, after hearing pursuant to section 2483, it is determined that the person would not have failed to submit but for the failure of the law enforcement officer to give the warnings required by subsection 3.

8. ISSUES. If a hearing is requested in accordance with section 2483, in addition to specific issues required by a specific offense, the scope of the hearing must include whether:

A. There was probable cause to believe the person operated a motor vehicle while under the influence of intoxicants;

B. The person was informed of the consequences of failing to submit to a test; and

C. The person failed to submit to a test.

9. RESULTS OF TEST. On request, full information concerning a test must be made available to the person tested or that person's attorney by the law enforcement officer.

§ 2522. Accidents

1. MANDATORY SUBMISSION TO TEST. If there is probable cause to believe that death has occurred or will occur as a result of an accident, an operator of a motor vehicle involved in the

motor vehicle accident shall submit to a chemical test, as defined in section 2401, subsection 3, to determine blood-alcohol level or drug concentration in the same manner as for OUI.

2. ADMINISTRATION OF TEST. The investigating law enforcement officer shall cause a blood test to be administered to the operator of the motor vehicle as soon as practicable following the accident and may also cause a breath test or another chemical test to be administered if the officer determines appropriate. The operator shall submit to and complete all tests administered. Except as otherwise provided in this section, testing must be conducted in accordance with section 2521.

3. ADMISSIBILITY OF TEST RESULTS. The result of a test is admissible at trial if the court, after reviewing all the evidence, whether gathered prior to, during or after the test, is satisfied that probable cause exists, independent of the test result, to believe that the operator was under the influence of intoxicants at the time of the accident.

4. SUSPENSION. The Secretary of State shall suspend for a period of one year the license of a person who fails to submit to a test under this section.

5. SCOPE OF HEARING. The scope of any hearing the Secretary of State holds pursuant to section 2483 must include whether there was probable cause to believe that the person was the operator of a motor vehicle involved in a motor vehicle accident in which a death occurred or will occur and whether the person failed to submit to and complete the test. If a person shows, after hearing, that the person was not under the influence of intoxicants or that the person did not negligently cause the accident, then the suspension must be immediately removed.

Nebraska

§ 60-6,103. Accident; driver or pedestrian sixteen years of age or older; person killed; submit to chemical test; results in writing to Director-State Engineer; public information

Any surviving driver or pedestrian sixteen years of age or older who is involved in a motor vehicle accident in which a person is killed shall be requested, if he or she has not otherwise been directed by a peace officer to submit to a chemical test under section 60-6,197, to submit to a chemical test of blood, urine, or breath as the peace officer directs for the purpose of determining the amount of alcohol or drugs in his or her body fluid. The results of such test shall be reported in writing to the Director-State Engineer who shall tabulate such results on a monthly basis. Such information, including the identity of such driver or pedestrian and any such amount of alcohol or drugs, shall be public information and may be released or disclosed as provided in rules and regulations of the Department of Roads. The provisions of sections 60-6,199, 60-6,200, and 60-6,202 shall, when applicable, apply to the tests provided for in this section.